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“The rights of Indigenous Peoples, including those in voluntary isolation and initial contact in the context of the extraction of critical minerals”

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Upholding Indigenous Peoples’ rights in the context of critical minerals extraction through the UN Guiding Principles on Business and Human Rights

Expert paper presenter

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As Vice-Chair of the UN Working Group on Business and Human Rights,¹ I am pleased to prepare this paper for the International Expert Group Meeting on “The rights of Indigenous Peoples, including those in voluntary isolation and initial contact in the context of the extraction of critical minerals”. The Working Group’s mandate from States is to disseminate, promote and implement the UN Guiding Principles on Business and Human Rights (Guiding Principles), which were unanimously endorsed by the Human Rights Council in 2011. Relevant to this Meeting, we have produced a thematic report on the extractive sector, just transition and human rights (A/78/155), which was presented to the UN General Assembly in 2023.

In this paper, I would like to address the questions provided in the concept note for this Meeting,² while also emphasizing the importance of strengthening engagement between the Indigenous Peoples’ rights movement and the business and human rights agenda. Considering how many of the human rights abuses suffered by Indigenous Peoples are perpetuated by businesses – abuses which the Working Group has been confronted with on our recent Country Visits to, for example, Argentina (A/HRC/53/24/Add.3) and Colombia³ – it is vital that the corporate responsibility to respect human rights, as outlined in Pillar Two of the Guiding Principles, serves as a point of focus in the final report and recommendations of the expert group.

The global transition to renewable energy is imperative to addressing the climate crisis. But this shift must not come at the expense of the rights and well-being of Indigenous Peoples, among other marginalized and at-risk groups. While speed is of the essence, the transition must be just and fair. As the world scales up renewable energy investments, it is paramount that the extraction of critical minerals – essential components of clean energy technologies – upholds the rights of Indigenous Peoples.

As is widely and repeatedly noted, Indigenous Peoples are living on the front lines of both the climate crisis and energy transition. While being disproportionately affected by the effects of climate change and environmental degradation, Indigenous Peoples’ lands and territories are known for being endowed with the critical minerals and precious metals required for the transition. It is, therefore, necessary for any extraction of critical minerals and metals from their lands and territories to be undertaken through a human rights-based approach that aligns with the requirements of Free, Prior and Informed Consent (FPIC) – noting that consent received from a Government or individual landowners does not equate to consent from the Indigenous communities themselves – as well as with Indigenous Peoples’ own development goals.

Because a just transition demands systemic changes that prioritize sustainable consumption, equitable access to clean energy, and the well-being of people and the planet, this entails a multifaceted and multistakeholder process for the transition involving States, businesses, international organizations, and Indigenous Peoples themselves, in accordance with international

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² See https://social.desa.un.org/sites/default/files/inline-files/Concept-Note_EGM_2024-%20English.pdf

³ End of Mission Statement available in Spanish at:

<https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/20240809-eom-statement-colombia-wg-business-es.pdf>

human rights standards. Adopting such an approach can reduce conflict, generate trust, and help address the legal risks associated with harmful corporate practices. Ensuring the rights of Indigenous Peoples in the context of critical minerals extraction is thus ethically imperative and makes good business sense.

States are the primary duty-bearers for ensuring a just transition that protects Indigenous Peoples' rights. Governments must enact and enforce clear and comprehensive regulatory frameworks that require corporate respect for human rights in the extraction of critical minerals. International human rights instruments – such as the Guiding Principles, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the UN General Assembly Resolution on the right to a clean, healthy and sustainable environment, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, and ILO Convention No. 169 – all serve as a valuable foundation on which States can develop and implement such a framework. Other steps that should also be considered include:

1. Legislating mandatory human rights due diligence (mHRDD) measures, in line with the “smart mix of measures” set out in the Guiding Principles, which require FPIC to be obtained from Indigenous Peoples and include equitable benefit-sharing arrangements. As per the Guiding Principles, human rights due diligence (HRDD) requires businesses to identify, prevent, mitigate, and account for the adverse impacts of their activities and business relationships on human rights, including the environment. Conducting HRDD also necessitates an assessment of the intersecting forms of discrimination and social exclusion, of which marginalized groups, including Indigenous Peoples, are especially at risk.
2. Mandating businesses to publicly report on project information, contracts, and human rights and environmental impacts to improve access to information by relevant stakeholders, including affected Indigenous communities, should such requirements not already be present in national legislation.
3. Implementing specific safeguards to protect and respect the autonomy, lands and territories of Indigenous Peoples living in voluntary isolation and initial contact, preventing forced contact and ensuring their cultural and economic survival.
4. Establishing clear standards for benefit-sharing and requiring transparency in agreements between businesses and Indigenous Peoples to enable shared prosperity and learning from positive practices, and to prevent such agreements from being misused as tools for coercion.
5. Providing adequate support and assistance to Indigenous communities, including in relation to financial, governance and legal guidance, to help ensure that they can participate effectively in decision-making processes, negotiate fair agreements, and access judicial and non-judicial mechanisms when harm has occurred.
6. Ensuring the safety and security of Indigenous persons and communities defending their rights against harmful extractive practices. Indeed, it would be regrettable should emerging regional frameworks, such as the Association for Southeast Asian Nations' Declaration on Environmental Rights (which is still being negotiated), not explicitly acknowledge the need to protect Indigenous Peoples and their rights in alignment with, *inter alia*, UNDRIP and the Guiding Principles.

7. Ensuring the accessibility of judicial and non-judicial grievance mechanisms that guarantee effective remedies for business-related human rights abuses, including environmental harms, and which respect customary laws and practices.
8. Supporting the process to develop an international legally binding instrument on business and human rights that accords with the Guiding Principles, and which can provide a comprehensive framework for corporate accountability and access to remedy for business-related human rights abuses, including those related to critical minerals extraction.

Businesses, including institutional investors and development finance institutions, operating in the critical minerals and extractives sectors have a fundamental responsibility to respect human rights, regardless of the regulatory landscape within which they operate. They must adopt and implement robust human rights policies that specifically address the rights of Indigenous Peoples. This includes:

1. Committing to obtaining FPIC from affected Indigenous communities before commencing any project, and ensuring that consent is free, prior, informed, and ongoing throughout the project lifecycle. This foundational requirement is important to embed explicitly in sector standards, including those that are attracting growing attention from Indigenous rights organizations like the Consolidated Mining Standard Initiative being proposed by ICMM, World Gold Council, Mining Association of Canada, and The Copper Mark.
2. Conducting HRDD throughout one's operations and business relationships to enhance transparency and traceability along value chains.
3. Developing and implementing equitable benefit-sharing mechanisms that provide tangible and mutually agreed upon benefits to Indigenous communities, going beyond mere corporate social responsibility practices.
4. Adopting a zero-tolerance approach to attacks and reprisals against Indigenous leaders and human rights defenders, as well as ensuring the safety and security of Indigenous communities, particularly Indigenous women, children and persons with disability living within these communities.
5. Providing access to affected Indigenous Peoples to culturally appropriate and gender responsive, operational-level grievance mechanisms.
6. Establishing clear rules for operations in areas where Indigenous Peoples in voluntary isolation and initial contact are present, in strict adherence to the precautionary, no-contact, and intangibility principles, so as to safeguard these communities from potential harm, including encroachment by extractive activities, and respect their right to remain in voluntary isolation.

Following this, co-ownership models, together with Indigenous Peoples-owned and -led renewable energy projects, offer promising pathways to rights-respecting outcomes in the critical minerals and extractives sectors. By prioritizing Indigenous ownership and leadership, businesses can build trust-based relationships that result in more sustainable projects, while reducing legal and operational risks. They can also tap into Indigenous knowledge and expertise, fostering innovation and ensuring projects are culturally and environmentally appropriate. Doing so can, in turn, create long-term value for both the business and the Indigenous communities.

* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

International organizations like the United Nations play a vital role in providing technical assistance and capacity development to Indigenous communities. This support is crucial in enabling Indigenous Peoples to effectively participate in decision-making processes, engage fruitfully in negotiations, and access remediation mechanisms when their rights are infringed upon. To further facilitate a just transition, these organizations should work in unison with one another to:

1. Continue providing technical assistance and capacity development to Indigenous communities, equipping them with the knowledge and skills to engage in negotiations with businesses, access justice and remedy, and monitor corporate compliance with relevant standards.
2. Monitoring the human rights impacts of critical mineral extraction projects and holding both States and businesses accountable for any violation or abuse.
3. Ramping up efforts to facilitate dialogue and collaboration among stakeholders, promoting the sharing of positive practices and fostering partnerships for sustainable development.

By embracing a human rights-based approach that prioritizes the rights and leadership of Indigenous Peoples, States, businesses and international organizations can work together to ensure that the extraction of critical minerals and metals contributes to not just a transition – but a just transition. Indeed, Indigenous-led initiatives have proved crucial to shaping policies and regulations that safeguard their lands, resources, and rights, as well as to pioneering new partnership models with businesses to guarantee shared prosperity. Indigenous efforts to develop, for instance, FPIC protocols and guidance for community-investor negotiation can further fashion powerful tools that enable communities to engage on their own terms with businesses, while better ensuring that resulting agreements and outcomes respect their rights and priorities.

Ignoring Indigenous Peoples' rights and continuing with a business-as-usual approach in the critical minerals and extractives sectors will not only perpetuate historical injustices, but also risk undermining the entire renewable energy transition. The legal challenges, costs, and delays associated with projects that fail to respect Indigenous Peoples' rights are mounting, especially with Indigenous communities increasingly turning to the courts to challenge harmful extractive practices and hold businesses accountable.

The global shift to renewable energy offers an unprecedented opportunity to build a more just and sustainable future – one in keeping with the spirit of the UN Guiding Principles on Business and Human Rights that upholds the rights of Indigenous Peoples everywhere and leaves no one behind.
